

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE LERNOUT & HAUSPIE SECURITIES LITIGATION)))))	Civ. Action No. 00-CV-11589-PBS
GARY B. FILLER, et al., Plaintiffs, v.)))))	Civ. Action No. 02-CV-10302-PBS
JO LERNOUT, et al, Defendants.)))))	
STONINGTON PARTNERS, INC., et al, Plaintiffs, v.)))))	Civ. Action No. 02-CV-10303-PBS
CARL DAMMEKENS, et al., Defendants.)))))	
PAUL G. BAMBERG, et al., Plaintiffs, v.)))))	
KPMG, LLP, et al., Defendants.)))))	Civ. Action No. 02-CV-10304-PBS (Consolidated)
JANET BAKER, et al., Plaintiffs, v.)))))	
KPMG, LLP, et al., Defendants.)))))	

ORDER

December 12, 2003

Saris, U.S.D.J.

INTRODUCTION

On Thanksgiving Day, November 27, 2003, KPMG Belgium filed an *ex parte* Writ with the Court of First Instance of Brussels (the "Belgian court") seeking to enjoin each plaintiff in these coordinated actions from taking any step to enforce or rely on Magistrate Judge Collings' November 13, 2003 discovery order and to penalize each plaintiff 1 million Euros if they take any such step to rely on or enforce the Order.

After hearing, the Court adopts the well-reasoned Report and Recommendation of Magistrate Judge Collings, to which defendant has orally objected. The Court orders the issuance of a preliminary antisuit injunction for the reasons stated below and in the attached Report and Recommendation.

DISCUSSION

Plaintiffs, as the moving party seeking a preliminary injunction, must meet four criteria before an injunction can issue. The Court must find: (1) that Plaintiffs have exhibited a likelihood of success on the merits; (2) that Plaintiffs will suffer irreparable injury if the injunction is not granted; (3) that such injury outweighs any harm which granting injunctive relief would inflict on the Defendant; and (4) that the public interest will not be adversely affected by the granting of the injunction. See Suarez-Cestero v. Pagan-Rosa, 172 F.3d 102, 104 (1st Cir. 1999); TEC Eng'g Corp. v. Budget Molders Supply, Inc.,

82 F.3d 542, 544 (1st Cir. 1996). Plaintiffs bear the burden of making each of these showings. See Int'l Ass'n of Machinists and Aerospace Workers v. Eastern Air Lines, Inc., 826 F.2d 1141, 1144-45 (1st Cir. 1987) (citing Planned Parenthood League of Mass. v. Belotti, 641 F.2d 1006, 1009 (1st Cir. 1981)).

Plaintiffs have established a likelihood of success.

"[W]hile it is well-settled that a federal court has the power to enjoin a party before it from pursuing litigation before a foreign tribunal, such an order often effectively restricts the jurisdiction of the foreign tribunal and should therefore be used sparingly." United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985) (citations omitted). "The equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice. Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum." Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984). See Canadian Filters, Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578-79 (1st Cir. 1969) (stating that while courts should be "reluctan[t] to interfere with courts of foreign countries . . . there are times when comity, a blend of courtesy and expedience must give way, for example when the forum seeks to enforce its

own substantial interests").

An antisuit injunction is necessary to protect this Court's jurisdiction over discovery, and to vindicate the important public policy of protecting investors from security fraud. If the Court does not grant the injunction and the Belgian court grants KPMG-Belgium's writ, plaintiffs will be unable to rely on the Federal Rules of Civil Procedure in order to obtain important discovery from KPMG-Belgium. See Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 539-540 (1987) (holding that "the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party to produce evidence physically located within a signatory nation").

Moreover, the equities favor granting the injunction. KPGM-Belgium, which has never contested jurisdiction, disregarded this Court's discovery Order. Then, without pursuing the appropriate routes of review in federal court (i.e., seeking a stay of that Order or filing timely objections to the Order with this Court), KPGM-Belgium filed an *ex-parte* writ in the Belgian court on Thanksgiving Day, essentially seeking to reverse and nullify this Court's Order. The Court may act to protect the litigants' rights to fair pretrial proceedings and its own jurisdiction. See Laker Airways, 731 F.2d at 931 (noting that district court may enjoin party from seeking to participate in foreign

proceedings "solely designed to rob the court of its jurisdiction"). While counsel for the defendant assures the Court that the Belgian Court will only hold a procedural hearing on December 16, 2003, and that it will not seek to enforce a Belgian judgment for 30 days after its entry, the penalties sought against plaintiffs are stiff. Plaintiffs will suffer irreparable harm if the Belgian court enters a judgment against them. They would have no appeal of the Belgian court's judgment in this jurisdiction.

Defendant protests that it is on the horns of a dilemma in Belgium because it faces criminal penalties if it turns over confidential accounting documents even pursuant to an order issued by a court that has jurisdiction. There is no evidence that any prosecutor has threatened criminal charges against KPMG-Belgium. More likely, that argument is a pretext. I find that any harm to the defendant is remote.

I must examine the public interest. I issue this order with reluctance because the Belgian courts and law must be treated with great respect. Nonetheless, KPMG-Belgium's end-run on this Court's jurisdiction and on the federal securities laws cannot be tolerated.

ORDER

The Court preliminarily enjoins KPMG-Belgium from proceeding with its writ, orders KPMG-Belgium to withdraw forthwith its writ

in the Court of First Instance of Brussels and orders it not to proceed with the hearing scheduled on December 16, 2003. KPMG-Belgium shall file proof of compliance with this order.

S/PATTI B. SARIS

United States District Judge

United States District Court District of Massachusetts

ATTACHMENT

IN RE LERNOUT & HAUSPIE
PBS
SECURITIES LITIGATION

CIVIL ACTION 00-11589-

GARY B. FILLER, ET AL.,

V.

CIVIL ACTION 02-10302-PBS

JO LERNOUT, ET AL.

STONINGTON PARTNERS, INC.,
ET AL.,

V.

CIVIL ACTION 02-10303-PBS

CARL L. DAMMEKENS, ET AL.,

PAUL G. BAMBERG, ET AL.,

V.

CIVIL ACTION 02-10304-PBS

JO LERNOUT, ET AL.,

CONSOLIDATED WITH

JANET BAKER, ET AL.,

V.

KPMG LLP, ET AL.

**REPORT AND RECOMMENDATION ON PLAINTIFFS' REQUEST FOR EMERGENCY
HEARING TO ENJOIN AND/OR SANCTION KLYNVELD PEAT MARWICK**

***BEDRIJFSREVISOREN FROM INITIATING FOREIGN PROCEEDING TO PREVENT
PLAINTIFFS FROM ENFORCING DISCOVERY ORDERS OF THIS COURT (#647 in
00cv11589, #345 in 02cv10302, #325
in 02cv10303 and #368 in 02cv10304)***

COLLINGS, U.S.M.J.

I. FACTUAL BACKGROUND¹

On April 18, 2003, the plaintiffs moved to compel Klynveld Peat Marwick Bedrijfsrevisoren ("KPMG-B") to produce a number of documents. On October 24, 2003, this Court held a hearing on the plaintiffs' motion and issued an order on November 13, 2003, directing KPMG-B to *inter alia* "produce to plaintiffs' counsel , on or before the close of business on Monday, December 1, 2003, copies of all audit work papers for the years 1998-2001 in its possession, custody or control and all audit manuals for the period January 1, 1997 to November 29, 2000, including all revisions thereto, in its possession, custody or control." (#633 at p. 16) (emphasis in original).² KPMG-B has produced its audit manual to the plaintiffs but otherwise has not produced any audit work papers, as ordered in the Court's November 13 order.

On December 1, 2003, the day by which KPMG-B was to have produced its audit work papers, the plaintiffs received a facsimile

¹

The facts recounted in this Report and Recommendation are only those facts that are relevant to the instant motion.

²

As the Court made clear in its November 13 Order, such documents have already been reviewed by the plaintiffs by virtue of their becoming civil claimants in the criminal proceedings pending against KPMG-B in Belgium, although the prosecutor in Belgium has not allowed the plaintiffs to have copies of the documents.

of an *ex parte* motion which KPMG-B filed on November 27, 2003, in Belgium with the Court of First Instance of Brussels (the "writ"). KPMG-B's writ sought to enjoin the plaintiffs in this case from attempting to obtain the discovery from KPMG-B which KPMG-B had been ordered to produce by this Court. (See # 652, Exh. C) Specifically, KPMG-B requests in its writ that the Belgian court:

Prohibit defendants, upon forfeiture of a penalty of 1.000.000 EUR [approx. \$1.2 million] per infraction by each defendant, to take any step of a procedural or other nature in order to proceed with the discovery-procedure, initiated by them in the framework of the aforementioned American procedures, including but not limited to:

1. taking any step of a procedural or other nature in order to execute or rely on the decision of the District Court of Massachusetts dated 13 November 2003 to produce the audit work papers;
2. taking any step of a procedural or other nature in the framework of the order of the American judge in its decision of 13 November 2003 to meet and confer with [KPMG-B] concerning the production of the requested documents....

(#652, Exh. C, p. 39) The Belgian court denied the *ex parte* application for an injunction but set the matter for a hearing on December 16, 2003.

In response to KPMG-B's writ, on December 3, 2003, the plaintiffs filed the instant motion seeking that this Court order KPMG-B to withdraw its "Writ in the Court of First Instance of Brussels and sanction KPMG-B \$5 million per day if it fails to withdraw its Writ." (#648, p. 13) On December 5, 2003, KPMG-B

filed its Memorandum in Opposition to Plaintiffs' Application for an Emergency Injunction (#-), and on December 5, 2003, this Court held a hearing on the motion. For the reasons discussed below, I will recommend that the plaintiffs' motion be allowed.³

II. ANALYSIS

The issue here is a straightforward one: can this Court order KPMG-B to withdraw its writ in Belgium, effectively preventing KPMG-B from pursuing an action in a foreign tribunal? "It is well settled that...American courts have power to control the conduct of persons subject to their jurisdiction⁴ to the extent of forbidding them from suing in foreign jurisdictions." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir., 1984) While such orders, typically called antisuit injunctions are not often issued (see, e.g., *Laker*, 731 F.2d at 927 ("injunctions restraining litigants from proceeding in courts of independent countries are rarely issued.")), there are certain circumstances, such as the ones in this case, in which such an injunction is appropriate and supported by the case law.

As the *Laker* court instructed:

There are no precise rules governing the appropriateness of antisuit injunctions. The equitable circumstances surrounding each

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This Report and Recommendation does not address the issue of the sanctions (if any) to be imposed upon KPMG-B if it fails to withdraw its writ.

⁴

There is no dispute here that KPMG-B is subject to the *in personam* jurisdiction of this Court.

request for an injunction must be carefully examined to determine whether...the injunction is required to prevent an irreparable miscarriage of justice. Injunctions are most often necessary to protect the jurisdiction of the enjoining court, or to prevent the litigant's evasion of the important public policies of the forum.

731 F.2d at 927. Thus, the Court may issue an antisuit injunction to protects its

own jurisdiction or to prevent the evasion of important public policies of the forum. In its Opposition and at the hearing, KPMG-B argued that in this case the Court may not issue the injunction sought by the plaintiffs because neither of the two prerequisites mentioned above are satisfied.

However, KPMG-B's argument fails for several reasons. First, the *Laker* court did not say that these two situations (i.e., protection of jurisdiction and policy concerns) are the only circumstances in which a court may issue an antisuit injunction. And, while it is true that "only in the most compelling circumstances does a court have discretion to issue an antisuit injunction," *Laker*, 731 F.2d at 927, the Court should carefully examine the equitable circumstances surrounding each request for an antisuit injunction. *Id.*

In this case, the equitable considerations weigh heavily in favor of granting the injunction. As the plaintiffs argued at the hearing, if they are unable to obtain the audit work papers from KPMG-B (which comprise the bulk of the case against KPMG-B),

discovery against KPMG-B will grind to a halt. And, as the court in *United States v. Davis*, 767 F.2d 1025, 1038 (2 Cir., 1985) ruled, the District Court's antisuit injunction "was a permissible exercise of authority necessary to insure a complete adjudication of the matter before it." Here, in the absence of the plaintiffs obtaining KPMG-B's audit work papers, the case against KPMG-B could not be fully adjudicated.⁵

Second, if the Court does not grant the injunction and the Belgian court does grant KPMG-B's writ, then this Court effectively will be deprived of jurisdiction over KPMG-B. While it is true that technically the Court still will have jurisdiction over KPMG-B, for all intents and purposes, the Court will not have jurisdiction over KPMG-B because it will not be able to enforce any discovery order against KPMG-B. In effect, any order against KPMG-B issued by this Court will be moot. Moreover, KPMG-B will be fully insulated from complying with U.S. discovery procedures because a Belgian court has ruled that it need not produce documents to the plaintiffs. Yet, KPMG-B certainly will still have the benefit of obtaining discovery from the plaintiffs and from other parties in

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At the hearing, counsel for KPMG-B referred to the language in the *Davis* case which says that an antisuit injunction should only issue in "very limited circumstances--and only after other means of obtaining the records have been explored." 767 F.2d at 1039. KPMG-B's counsel argued that therefore this Court could not issue an antisuit injunction until the plaintiffs had resorted to letters rogatory as a means of obtaining the requested documents. However, the *Davis* court *did not say that all* alternate means had to have been exhausted. And, indeed, in this case, the plaintiffs have used other means of trying to obtain the documents--specifically, they have become civil claimants in the criminal proceeding in Belgium (as KPMG-B itself recommended to the plaintiffs) but have not yet received copies of the audit work papers from the Belgian prosecutor. Moreover, the Court need not require that the plaintiffs resort to letters rogatory, as will be discussed more fully below.

the case. Thus, the antisuit injunction is necessary in this case to protect the Court's jurisdiction.

Finally, if this Court does not grant the antisuit injunction, it will put the plaintiffs in the position of having to resort to letters rogatory because they will be unable to rely on the Federal Rules of Civil Procedure in order to obtain discovery from KPMG-B. This situation is precisely the one that the Supreme Court in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) rejected.

III. CONCLUSION

For the aforementioned reasons, I hereby RECOMMEND that the Plaintiffs Request for Emergency Hearing to Enjoin and/or Sanction Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren from Initiating Foreign Proceeding to Prevent Plaintiffs from Enforcing Discovery Orders of this Court (#648) be ALLOWED to the extent that KPMG-B be ordered to withdraw its writ in the Court of First Instance of Brussels.

IV. Review by the District Judge

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrate [Judge]s in the United States District Court for the District of Massachusetts, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within 10

days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the recommendations or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1 Cir., 1980); *United States v. Vega*, 678 F.2d 376, 378-79 (1 Cir., 1982); *Scott v. Schweiker*, 702 F.2d 13, 14 (1 Cir., 1983). See also *Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Robert B. Collings

ROBERT B. COLLINGS

United States Magistrate Judge

December 15, 2003.

Publisher Information

Note*This page is not part of the opinion as entered by the court.
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of publishers of these opinions.

1:00-cv-11589-PBS In Re: Lemout & Hauspie v., et al

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